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In The

Supreme Court of the United States

October Term, 1991

COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA, and its affected members,

Petitioner,

v.

CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, and DOES 1-20,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF CALIFORNIA BUILDING INDUSTRY ASSOCIATION AND ITS TWO MEMBERS, THE BUILDING INDUSTRY ASSOCIATION OF THE DELTA AND CENTRAL VALLEY IN SUPPORT OF PETITIONER

STEVEN A. HERUM
Counsel of Record
California Building Industry Association, Building Industry Association of the Delta and Central Valley
509 W. Weber Avenue, Fifth Floor
Post Office Box 20
Stockton, California 95201-3020
(209) 948-8200

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. INTEREST OF AMICUS CURIAE[1]

The California Building Industry Association is a federation of ten regional and local associations representing

[1] Counsel of record have consented to the filing of this amicus brief and those letters have been filed with the Clerk pursuant to Supreme Court Rule 37.

6,000 members engaged in commercial and light industrial construction and the building of most of California's residential housing. The Building Industry Association of the Delta and the Building Industry Association of the Central Valley are two of the representative local associations. The interest of the amici is in seeing that governmental burdens upon the construction industry and its projects are fairly imposed, clearly attributable to its activities and predictable.

As federal and state funding for city and county government has become increasingly scarce, local agencies are searching for new methods to increase their revenue. A very popular target has unfortunately been fees on construction projects. Of course, under the U.S. Supreme Court case of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court required that a "nexus" must exist between the development project and the condition imposed. Absent this nexus, the condition is invalid and constitutes a taking in violation of the Fifth Amendment to the United States Constitution.

The case of *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), directly calls into question this Court's decision in *Nollan* and seeks to determine how direct and substantial the nexus must be in order to impose conditions on a project.

Practitioners throughout the nation face this critical question on a weekly and even daily basis. Questions concerning the nexus requirement of *Nollan* are repeatedly raised in hearings and meetings before local city and county planning commissions and city councils, and it is

our experience that the case at bar has created confusion and chaos with respect to the takings question.

Because of the divergent decisions, attorneys for applicants, the opposition, and local agency attorneys spend countless hours arguing over the question of whether an ordinance or resolution or permit condition constitutes a taking. It is not at all unusual for such arguments to occur at two in the morning, after hours of public testimony on the issue.

Thus, from a purely practical standpoint, this Court is respectfully and indeed, strongly urged to grant this request for writ of certiorari so that those who face this issue on a repeated and continual basis will have clear and definitive guidance from this Court on this critical issue.

II. SUMMARY OF ARGUMENT

As a practical matter, attorneys representing applicants or opponents who regularly appear at planning commission meetings and city council meetings constantly face the *Nollan* question. The mischief caused by uncertain rules inevitably lead to uneven and inconsistent treatment of real property rights on a jurisdiction by jurisdiction or case by case basis.

This Court would not tolerate such uncertainty in matters of political or religious freedom. This Court stated in footnote 2 of the majority opinion in *Nollan* that "the right to build on one's own property – even though its exercise can be subjected to legitimate permitting

requirements – cannot remotely be described as a 'governmental benefit'." Thus, this Court has impliedly recognized that the right to build and develop one's own property is a right, not just a privilege. (*Cf. Trent Meredith, Inc. v. City of Oxnard*, (1981) 114 Cal. App. 3d 317, 328, 170 Cal. Rptr. 685.) If property rights stand on equal footing with other constitutionally protected rights, this Court should not tolerate such uncertainty in the important area of property rights.

The result of inconsistent interpretations of the *Nollan* decision is a cloud of uncertainty which frustrates attempts to determine what is or is not a taking under *Nollan*. It is therefore imperative that this Court grant the writ of certiorari in this case to provide clear guidelines to the lower courts and local agencies so that certainty and consistency can once again be restored in this important area of property rights.

III. ARGUMENT

A. The *Nollan* Question Occurs On A Weekly Basis

Attorneys who represent clients appear on a weekly basis at a variety of local government meetings, including city and county planning commission meetings, city council meetings and board of supervisors meetings. One of the most frequent questions faced by both local government attorneys and applicant's attorneys is whether a local government regulation constitutes a taking under *Nollan*.

It is not at all unusual for such arguments to be made at two in the morning, as such meetings begin early in the evening and often run late into the night. And it is not unusual for such discussions to become a heated debate, because case law at the present time lends itself to inconsistent interpretations.

Such debates are neither necessary nor productive. As this situation will continue to occur for the foreseeable future until this Court gives clear guidance on the takings question raised by *Nollan*, and since this question is faced on a continuous basis by practitioners in the field, a resolution of this important question is clearly warranted.

B. The Lower Courts Have Rendered Inconsistent Decisions Under *Nollan*

This Court made clear in *Nollan* that the takings test to be applied to permit conditions is whether the exaction substantially advances legitimate state interests. This Court carefully distinguished this test from the rational basis standard applicable in due process and equal protection cases. *Nollan*, 483 U.S. at 834, n.3. The Court pointed out that in the exaction context there is a "heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." *Id.* at 841.

The California District Court of Appeal in *Surfside Colony, Ltd. v. California Coastal Commission*, (1991) 226 Cal. App. 3d 1260, 1270, interpreted *Nollan's* takings test as involving a heightened level of scrutiny distinct from the rational basis standard and extreme deference previously applied by California courts to permit conditions.

The California court explained that *Nollan* "changed the standard of constitutional review in takings cases. Whether the new standard be described as a 'substantial relationship,' or 'heightened scrutiny,' it is clear the rational basis test . . . no longer controls." *Id.*

In direct conflict with *Surfside Colony,* the Ninth Circuit in the present case applied a rational basis standard and stated: "We are not persuaded that *Nollan* materially changes the level of scrutiny we must apply." *Commercial Builders,* 941 F.2d at 847; Petitioner's Appendix at A-6.

More recently, the conflict regarding the *Nollan* standard has been made even more confusing. In *Blue Jeans Equities West v. City and County of San Francisco,* (1992) 3 Cal. App. 4th 164, another California District Court of Appeal was faced with the task of reconciling the inconsistent decisions in *Surfside Colony* and the case at bar. The unprecedented approach taken in *Blue Jean Equities* was to decide that *Nollan's* heightened scrutiny test applied to possessory taking claims but not to regulatory taking claims. *Blue Jean Equities,* 3 Cal. App. 4th at 171. To reach this conclusion, the California court relied upon the decision by the Ninth Circuit in the case at bar. *Id.*

These conflicting interpretations are not only contrary to the plain language of *Nollan,* but are resulting in substantial confusion for practicing attorneys and government agencies. The difficulties presented in attempting to apply *Nollan's* test when it has been interpreted in such different ways by lower courts is a major problem which should be corrected by this Court.

IV. CONCLUSION

The decision in *Commercial Builders* is clearly contrary to *Nollan* and has produced widely divergent interpretations among California courts. As a result, if allowed to stand, the precedent in this case will continue to cause uncertainty in land use decisions on a repeated and ongoing basis. Accordingly, this Court is respectfully requested to grant certiorari so that local agencies and practicing attorneys representing property owners before those agencies are provided clear guidance and direction with respect to this important question in takings jurisprudence.

Respectfully submitted,

STEVEN A. HERUM
Counsel of Record
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Post Office Box 20
Stockton, California 95201-3020
(209) 948-8200